UNITED STATES CIRCUIT COURT OF APPEALS,

NINTH CIRCUIT.

No. 45

SOUTHERN PACIFIC COMPANY, PLAINTIFF IN ERROR,

vs.

ASA M. HAMILTON, DEFENDANT IN ERROR.

BRIEF FOR THE DEFENDANT IN ERROR.

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IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT.

SOUTHERN PACIFIC COMPANY,
Plaintiff in Error,

vs.

ASA. M. HAMILTON,
Defendant in Error.

Brief for the Defendant in Error.

The writ of error filed in the Clerk's office of the Circuit Court of the United States for the District of Nevada, wherein the Southern Pacific Company is Plaintiff in Error and Asa M. Hamilton is the Defendant in Error, ought not to be prosecuted in the above entitled Court but should be dismissed because no bill of exceptions or statement, as required by the rules of the said Court and the said Circuit Court of the United States for the District of Nevada, in support of

the motion of the plaintiff in error for a new trial was ever made, or presented to the Judge of the said Circuit Court for the District of Nevada within the time required by the rules of practice thereof, or was ever filed in said Court or settled until after the motion of the plaintiff in error for a new trial was heard and denied.

In the Circuit Court of the United States for the District of Nevada, Asa M. Hamilton, the defendant in error, was plaintiff, and the Southern Pacific Company, the plaintiff in error, was the defendant. The case came on for trial at the November term, 1891, of said Court, and the Jury impanelled and sworn to try said case, did, on the 14th day of November, 1891, render a verdict in favor of the plaintiff and against the defendant for the sum of $44,750.00, and judgment thereon was duly entered for said sum on the 16th of November, A. D., 1891.

Immediately after the entry of the said judgment, the defendant, by its attorneys, gave notice of a motion for a new trial upon the grounds stated on pages 78, 79 and 80 of the transcript of the record, which was argued, submitted and disposed of on the 3d day of February, 1892.

The Court denied the motion for a new trial in consideration of the fact that plaintiff had filed his consent that the judgment in said cause be reduced to $15,000.

No bill of exceptions was prepared in form, presented to the judge or served upon the attor-

neys of plaintiff at any time before the hearing of the motion for a new trial.

Rule 22 of the Rules of Practice of the United Circuit Court for the North Circuit District, Nevada, requires that the bill of exceptions be "prepared in form and presented to the Judge "within ten days after verdict."

"Rule 25 provides the bill of exceptions shall, "within ten days after the termination of the trial, "be drawn up, filed and a copy served on the "attorney of the adverse party, who, within five "days thereafter, may prepare, serve and file "amendments thereto."

It also provides that where a party proposing a bill of exceptions fails to present his bill within the time limited, his bill of exceptions shall be deemed *abandoned and his right thereto waived.*

The record shows that no bill of exceptions was filed or served by the defendant, the plaintiff in error herein, until the 12th day of March, A. D., 1892, one month and nine days after the Court modified the judgment by reducing it to $15,000 and denied the motion for a new trial, and four months less two days from the rendition of the verdict.

The bill of exceptions was allowed and settled on the 21st day of March, A. D., 1892, the attorneys of plaintiff interposing written objections to the settlement thereof on the ground that the Court had lost jurisdiction and contest of said cause and had no authority to settle the said

proposed bill of exceptions: that the time had expired in which to allow or present the bill of exceptions in said cause: that under the Rules of Practice of the said Court, the bill of exceptions must be prepared in form and *presented to the Judge* within ten days after verdict, and unless so prepared and presented, they shall be deemed waived: that no bill of exceptions in support of defendant's motion for a new trial was ever made or filed in said cause, and the Court had no authority to permit or allow a bill of exceptions after the motion for a new trial had been heard and denied: that the record on appeal to the Court of Appeals must be the same record, and cannot be different from the record upon which the Court acted at the hearing of the motion for a new trial.

It requires no citation of authorities to prove that these objections are well taken.

The bill of exceptions under Federal and State Practice must be prepared, served and settled prior to the hearing of a motion for a new trial.

Upon the bill of exceptions, the Court grants or denies a new trial and the bill of exceptions is the basis of appeal by the party dissatisfied with the order of the Court refusing or granting a new trial.

After the Court denied the defendant's motion for a new trial, it lost jurisdiction of the case and had no power to settle a bill of exceptions thereafter, for if it had such a power it could exercise

it at any time before the record was sent up to the Appellate Court.

No bill of exceptions was ever served upon the attorneys of the plaintiff until after the motion for a new trial was acted upon by the Court. Therefore, no opportunity was given them to make or offer amendments to the bill of exceptions, and no bill of exceptions could be allowed by the Court if the right to offer amendments were cut off.

The attorneys of the plaintiffs would be doing a vain and idle act to offer amendments to a document called a bill of exceptions, filed months after the rendition of the verdict, and long after the motion for a new trial was disposed of.

To recognize it as a bill of exceptions, is to permit a record to be made up and sent to the Court of Appeals, entirely different from that on which the Court acted at the hearing of the motion for a new trial.

The bill of exceptions, part of the record in this case, must be treated as worthless, it being filed and served after the motion for a new trial was denied, if the Rules of Practice in the Court which acted on the motion require the bill of exceptions to be settled before the hearing.

The attorneys for the defendant and plaintiff in error moved to strike from the files of the Court, the objections heretofore stated to the allowance of the bill of exceptions, because they were not warranted by any rule of law and were filed too late to entitle the plaintiff to be heard.

If the bill of exceptions, served or filed six weeks after their motion for a new trial was heard and denied, was in violation of the plain rules of practice governing the Supreme and Circuit Courts of the United States, it is of no value and it can never be too late to urge an objection to the insertion in the record of this case of a worthless paper.

If, under the rules of practice, the bill of exceptions incorporated in the record of this case was not prepared, served or filed in the time by them prescribed, if no opportunity was given the plaintiff and defendant in error to present amendments to it before the motion for a new trial was heard and denied, it is not too late to call the attention of the Court to the fact that no bill of exceptions, as required by the rules of this Court and of the Circuit Courts of the United States, is part of the record in this, that no appeal has been perfected and that the writ of error should be dismissed.

See *Haley* vs. *Eureka Co. Bank,* 20 Nev. p. 411, and authorities cited on p. 426.

Feeling confident that the foregoing point is well taken and that it is decisive of this case as it was in the case above cited, yet we deem it best to proceed and answer the brief of appellants herein.

The statement of the case made by the plaintiff in error is correct as far as it goes, but it is not quite full enough in some particulars. For instance it should state that when the

defendant in error purchased his ticket he also purchased a berth upon a through Pullman sleeping car from Denver to San Francisco, and had his baggage checked upon the ticket in dispute between the same points. That he rode from Denver to Ogden, a distance of over 700 miles, upon the U. P. R. R., and no fault whatever was found with the ticket. Another correction to the statement is that Mr. Whited said, p. 60 transcript, "I am well acquainted with him (Derby-
"shire) and have a great deal of confidence in him.
"I was his superior officer, and it was his duty to
"report to me. In certain matters connected with
"the running of trains and conduct of passengers
"he was subject to orders. I sent this word to the
"agent at Lovelock by telegram. I saw that dis-
"patch yesterday,signed J. H.W.; that is the ordi-
"nary way I sign my name. I did sign my name
"in that dispatch in that way, and the contents of
"that dispatch is what I sent. That is the way I
"signed all my official dispatches to employees
"generally."

When the train arrived at Lovelock the defendant in error was arrested by direction of Derbyshire, Whited and Donlen. The latter was the agent of the corporation at that point. Donlen afterwards swore to a complaint charging defendant in error with committing a felony at Lovelock, 35 miles distant from Rye Patch.

Messrs. Baker and Wines, the attorneys of plaintiff in error, prosecuted defendant in error, and

the prosecuting attorney of Humboldt County, Nevada, was not present, and that Hamilton was discharged by the magistrate upon the investigation of said charge; that Cozzens received all his information about the alleged felony from the agents of the corporation. That there had been in June, 1891, a trial of this same case before the United States Circuit Court at Carson City, Nevada, which was abandoned after all the evidence was in and three of the counsel had made their argument, leaving one argument to be yet made, because of the illness of two of the jurymen on the case, they having been taken sick. That on the case going over counsel entered into a stipulation, duly filed in the case, that the testimony of any witness who had testified in the said trial of the case might be used on the hearing of the case when it came up again. That on said first trial the defendant brought one Dentson from Omaha, who testified among other things that he was the assistant city ticket agent of the U. P. Co., at Omaha; that he sold the ticket in dispute, and that he had a right to sell it as the servant of the U. P. Co., who were the agent of the S. P. Co. for that purpose, and that it was in the form agreed upon by the companies, the U. P. Co. and the S. P. Co., and others. That when he sold it it was signed by the purchaser. That when the case was subsequently tried, counsel for plaintiff asked counsel for defendant, in open Court, if they intended to rely upon that part of Dentson's evi-

dence which went to prove that the ticket had ever been signed, and upon an unsatisfactory answer having been returned the Court asked the same question and added, "I want to know "because, if you are, I will instruct the jury that "there never has been a signature upon the ticket," upon which statement by the Court Mr. Wines said, "No your honor, we will drop that,we do not "think the ticket has ever been signed, and we do "not consider it material;" that Patterson was a servant of the corporation, to-wit, car inspector of the whole system.

We will now proceed to answer the brief of counsel for plaintiff in error.

As we see the argument there are but two points. First, that the officer did not act as the servant of the company and, Second, the damages are excessive.

It was right and proper for the Court to submit to the jury as a question of fact, to be ascertained by it, the capacity in which Eugene Cozzens acted, in removing plaintiff (defendant in error) from the cars of plaintiff in error at Lovelock, whether as an officer of the law or as an agent of the corporation. And the jury found the fact to be that he acted in the capacity of an agent of the company.

Penn. Co. vs. *Connell,* 20 N. J., 91.

A passenger on a train may resist when under the circumstances resistance is necessary for the protection of his life, or to protect probable serious injury.

In *Southern Kansas R. Co.* vs. *Rice,* the Court says:

"Of course a party upon a train may resist "when under the circumstances resistance is nec- "essary for the protection of his life, or to prevent "probable serious injury."

And in *Ch., St. L. & P. R. Co.* vs. *Graham*, reported in 29 Northeastern, the Court says, at p. 171:

"It is further contended that it was the appellee's "duty to pay the return fare demanded by the "conductor, out of consideration for the rights of "other travelers, and that his only right of action "would be to recover from the company the ex- "cess charged. If he had paid the extra demand, "and been carried to his destination, perhaps "he could only recover the excess, unless some "element of special damages entered into the "occurrence; but he was not bound to do this. "This identical question was before the Court in "*Railroad Co.* vs. *Rogers, supra* (28 Ind. 1), and "in deciding it the Court said: 'The plaintiff was "'under no obligation to purchase, even for a trifle, "'the right which was already his own.'"

English vs. *Delaware & Hudson Canal Co.*, 23 Am. Rep., 69.

In the last case the Court says at pp. 71, 72:

"Cases occur where circumstances may imperatively require that the passenger should remain "on the train on account of others who may be "there in his charge, or where it is indispensible "that he should hasten on his journey without "delay; and if by reason of the mistaken judgment or willfulness of the conductor he could be "expelled when lawfully there, serious injury "might follow. The law does not, under such "circumstances, place the passenger within the "power of the conductor; and when lawfully on "the cars he is authorized to vindicate such right "to the full extent which might be required for "his protection."

Hufford vs. *G. R. & I. R. Co.*, 8 Am. St. Rep., 858, and authorities cited on p. 863.

It may be argued in this connection that Hamilton was a trespasser and had no rights which the company should respect, but we think the Court will not so decide. He was there by color of title upon a ticket sold by their agent and which they acknowledge would be perfectly good the moment Hamilton signed it. If it was good with his signature it was good without it, because as a question of law, if a man accepts a written contract signed by the other party and acts on it in good faith, and it becomes partly executed, it does not

need his signature. But even outside of that we think the case of *Kent* vs. *Baltimore,* etc., *R. R. Co.*, 4 Am. St. Rep., p. 539, is conclusive that Hamilton was a passenger on right upon the train at the time of the ejection.

Owens, C. J., delivering the opinion of the Court, says at pp. 540, 541:

"The instructions, requested and refused, ig-
"nored the proof which tended to show that Kent
"received the ticket from the company's agent
"without actual knowledge of the conditions and
"directions written therein. They also presup-
"posed that, by receiving the ticket, Kent acqui-
"esced in all its terms and conditions, in spite of
"the fact (which the evidence tended to prove)
"that he may have been wholly ignorant of
"them.

"It is well settled that the purchaser of a rail-
"road ticket does not, by its mere acceptance,
"acquiesce in and bind himself to all the terms
"and conditions printed thereon, in the absence of
"actual knowledge of them."

Baltimore & O. R. R. Co. vs. *Campbell*, 38; Am. Rep. 617.
Davidson vs. *Graham,* 2; Ohio St. 135.
Jones vs. *Voorhes,* 10; Ohio, 145.
Rawson vs. *Pa. R. R. Co.*, 8; Am. Rep., 543.
2 Wharton on Evidence, sec. 1243.
Brown vs. *Eastern R. R. Co.*, 74; Am. Dec. 598.

Camden & Amboy Ry. Co. vs. *Bauldof,* 16; Pa. St., 67.
Wade on Notice, secs. 543, 552, 554, 555.
Lawson on Carriers, secs. 106, 107.
Blossom vs. *Dodd,* 3; Am. Rep., 701.
Quimby vs. *Vanderbilt,* 72; Am. Dec., 469.

"There is nothing in the circumstances that the "ticket in the case at bar was sold at a rate "reduced from the regular fare to take it out of "the rule. The rate was the usual and established "one allowed to a numerous class of patrons, com- "prising commercial travelers whose principals "were shippers over the Company's road.

"The contract between Kent and the Railroad "Company was made when he bought the ticket, "received it and paid for it.

Rawson vs. *Pensylvania R. R. Co., supra.*

"Neither party could, after that, change its "terms or impose new conditions upon its enforce- "ment without the consent of the other. Accord- "ing to the Company's instructions to agents, and "by the uniform custom regulating the sale of such "tickets, they were required to be signed before "their delivery to the purchasers. The company

"saw fit, in the case at bar, to dispense with this "requirement. It received the plaintiff's money, "delivered him the ticket, in his ignorance of any "request that he sign it, honored it for several "trips without first requiring him to sign its "conditions.

"It thereby waived this requirement, and its "conductor was not justified, while it still retained "plaintiff's money, in ejecting him from its cars, "by reason of his failure to sign the ticket, which "had already gone into full effect between the "parties, and his failure to pay the usual fare in "money for a passage which was already paid for."

And Hamilton being rightfully on the train, because he was there by reason of a ticket which was agreed upon by the parties of the Transportation Association, of which this plaintiff in error was one, and which the W. P. Co. had a right to issue.

In *Southern Kansas R. Co.* vs. *Rice, supra,* the Court says: "Complaint is also made of other "instructions to the Court regarding the measure "of the damages." Among other things, the Court said to the jury that if "the assault was "malicious or without cause or provocation, or "was accompanied by acts of gross insult, outrage, "or oppression, you may award the plaintiff "exemplary or vindicative damages." Also, "that in estimating damages they might take "into consideration the indignity, insult, and in-"jury to plaintiff's feelings by being publicly

"expelled." Further, that if they found "there "was on the part of the conductor either malice, "gross negligence or oppression, they would not "be confined in fixing damages to the actual dam- "ages received, but were justified in giving exem- "plary damages. It is said that these instructions "were misleading and erroneous because there was "no evidence whatever to show the conductor "acted with malice or gross negligence. Upon the "evidence of Rice, corroborated by McCullough, "another passenger, who said he saw Rice pur- "chase the ticket on October 29th, there was "evidence before the jury upon which to found "these instructions."

Hifford vs. *Railroad Co.* (Mich.), 31 N. W. Rep. 544.

"The forcible expulsion of Rice from the car "where he was rightfully seated was such a wrong "as is inevitably accompanied with more or less "outrage and insult. There was no excuse for "the act of expulsion except the honest mistake "or gross negligence of the conductor. If that "mistake was due to such reckless indifference to "the rights of a passenger, on the part of the con- "ductor, as established gross negligence amounting "to wantonness, and the jury so found, they might "find exemplary damages."

Railroad Co. vs. *Kessler, supra.*
Railroad Co. vs. *Rice,* 10 Kan., 426.

" Whether the conductor was grossly negligent, " amounting to wantonness, or actuated by malice, " were matters before the jury, for their deter- " mination upon the evidence."

And so it was in this case, and it does not matter whether the conductor was told to do it or not, whether he did it of his own accord, or by orders of Mr. Towne, or whether he did it or Donlen did it, or Whited did it, or all were to blame for it, they were all acting within the line of their employment, and therefore the corporation is responsible for it. Ah, but, say counsel for plaintiff in error, there was no evidence at all upon which to predicate the verdict. That is their only hope. Upon that very question they fought before the Trial Court and urged it before Judge Hawley, who promptly disagreed with them. Now, let us see for ourselves if there was no evidence upon which the jury could find a verdict, and we maintain that if there was evidence to support a verdict for any amount, no matter how little, then this Court cannot set it aside.

The admitted facts are that the U. P. Co. and S. P. Co. agreed upon the ticket which Hamilton held; that the U. P. Co. was an agent of the S. P. Co. for that purpose: that if the ticket had been signed, it would have been perfectly good: that the U. P. Co. as agent for the S. P. Co. was direlict in its duty in selling it without the purchaser's signature: that the last part of

the ticket belonged to another R. R. Co., to wit: the California Central Ry., and not to the S. P. Co.. who only allowed the coupons between Ogden and Los Angeles: that the full price was paid for the ticket to the agent of the S. P. Co: that some one rode from Omaha to Denver upon it: that Hamilton rode from Denver to Ogden on it: that he purchased his first-class Pullman Sleeper ticket on it to San Francisco: that his baggage was checked from Denver to San Francisco on it, and that he was taken off by Cozzens and Turner at Lovelock on complaint of the servants of the corporation: that no warrant was issued until 20 or 30 minutes after his arrest, and then on complaint of the agent of the Company at Lovelock, Nevada: that the arrest was not made until the warrant was served: that the attorneys of the Company prosecuted Hamilton on the alleged felony: that the district attorney of the County was not present: that the servants of the Company were the witnesses who appeared against Hamilton: that he was placed in irons under arrest, held for several days, and after an examination was discharged by the committing Magistrate, who heard all the evidence in the case: that he had to employ counsel to defend him: that he had to buy a ticket to San Francisco at Lovelock upon which to ride: that he had to send for money, as he had not enough to pay his fare to San Francisco, having only $13.25 upon him when taken

off the train. Now if there is not evidence enough in the undisputed facts to go to the jury, then no case ever had. For a Court to refuse to let such a case go to a jury would be to deny a man due process of law, and we do not apprehend any such state of facts exist in our country.

Cozzens removed Hamilton from the train at Lovelock, put him in irons, would have put him in jail if he had not obtained surety for his appearance, and all at the instance and request of plaintiff in error. Whitehead, superintendent of the corporation, was telegraphed to about the matter, addressed as superintendent. Whitehead, as such superintendent, telegraphed to Donlen, the agent of the corporation at Lovelock, as agent of the corporation, to have an officer on hand on the arrival of No. 4, pp. 40, 49 transcript, and at p. 60 Mr. Whited said: "I saw the dispatch yesterday signed J. H.W." * * "That is the way I sign all my official dispatches to employees generally."

The machinery of the County was not used to prosecute Hamilton before the committing magistrate. Transcript p 26. "You (addressing Mr. "Macmillan) defended me, and Messrs. Baker and "Wines prosecuted the case. The district attor-"ney of Humboldt County was not present. The "complaint was sworn to by Mr. Donlen, defend-"ant's agent at Lovelock," and at p. 49 the constable says all the information he got was from the defendant (plaintiff in error) or its agents.

It is all the way through superintendent Whited, conductor Derbyshire, and agent Donlen, and Mr. Donlen, the agent, swore to and signed the complaint upon which the warrant was issued, pp. 26 and 48 of transcript.

All the testimony in the case shows the arrest and prosecution was made by the corporation, and therefore the corporation is responsible.

Hall vs. *Memphis R. R. Co.*, XV, Fed. 89 and Sec. 16 (b).
Harris vs. *Louisville N. O. & T. R. Co.*, 35 Fed. 121 and 128.
Wheeler & W. M. Co. vs. *Boyce*, 59 Am. Rep. 574.
Williams vs. *P. I. Co.*, 34 Am. Rep. 499, bottom of page.
Meecham on Agency, Sec. 741, beginning at p. 582 and ending at p. 588.
A. & E. E. of Law, vol. 5, p. 12.
Morawetz on Private Corporations, Sec. 727.
Collett vs. *Foster*, 2 Hurlstone and Coltman 356.
Bayley vs. *R. Co. L. R.*, 7 C. P. 415.
Burnap vs. *Marsh*, 13 Ill. 535.

If the constable had had a warrant issued upon a complaint filed by the corporation, it would have been just as liable. The fact that the agents of

the corporation alleged that a felony had been committed when in fact no felony had been commited would not help the corporation. It would perhaps protect the officer, but would be no protection to the party starting the machinery of the law in motion.

See the authorities above cited.

A police officer, by responding to the invitation of the regular agents of the company to aid in enforcing its regulations, becomes, for that purpose, a special agent for the company, and for the conduct of such special agent, within the scope of his employment, the company is responsible.

Collett vs. *Foster,* 2 Hurlstone & Coltman, p. 356.
Bayley vs. *Railway Co.,* L. R. 7 C. P, 415.
And authorities cited above.

These are incontrovertible legal principles.

Hill vs. *Memphis & C. R. Co.,* 15 Fed., p. 89, sec. 16.
Harris vs. *L. N. O. & T. R. Co.,* 35 Fed. 116 and note 1.

The Court says in the last case, p. 121, "That "the defendant is responsible to the plaintiff in

"the facts of this case there can be no doubt. We "all know that the defendant did not, and none "of us believe that its officials would, under any "circumstances, authorize or sanction a proceeding "like that which was taken against the plaintiff; "nevertheless, it employed Anthony as its agent, "and is responsible for his incompetency and "negligence in the line of that duty he was sent "to perform in this case."

"The defendant has proved much, very much, "that should go in mitigation of damages, but not "one thing by way of substantial defense. The "pretense that Anthony was not its agent scarcely "deserves notice; but if he were not, Theil & Co "were its agents, and Anthony theirs, and, being "theirs, was that of the defendant likewise. More-"over, Anthony was in direct employment in the "sense that he was detailed to do its work, and sent "to do this as part of it." What is their work which he was sent to do? Why, to arrest a felon; to arrest a man who had stolen their money—not broken a rule of the company, but a law of the land.

See statement of this case on pp. 117–118, 35 Fed. Rep.

At p. 128 the Court says upon motion for a new trial: "Being originally authorized by the de-"fendant to arrest McCall, the detective agency "or Anthony, who had been detailed for the ser-

"vice of the defendant, as a detective, and had "been sent on that business, one or both were at "the time of this arrest and in making it, acting "within the scope of the defendant's employment, "although acting wrongfully in disobedience of "orders."

In *Wheeler & Wilson Manufacturing Co.* vs. *Boyce, supra,* the Court at p. 574 says: "It is "next contended that the company can not be "held liable for the wrongful acts of Baker and "the constable, and an instruction is challenged "which holds that if the agent of the company "caused and procured the arrest and detention of "the defendant in error, as charged, the company "and its agents are both liable. Baker was the "managing agent of the company, his authority "was general, and the constable acted wholly "under his direction and sanction."

Therefore we say that the question was one for the jury to determine under the instructions of the Court, whether the arrest was made "as a means "to the end of ejecting or removing plaintiff from "the car on the ground that he refused to sign his "name, pay his fare or leave the car," and it decided that it was for the purpose of ejecting plaintiff from the car, and therefore the plaintiff in error was liable. It must be plain to the Court as well as to the trial Court that the jury was right.

The jury also must have determined that if a criminal charge was made, it was not made upon

a reasonable cause of the commission of any felony by plaintiff (defendant in error).

There was no vice in the instruction submitting that fact to the jury, because there was an issue upon it, and the issue was whether it was true in fact or was a ruse for the purpose of getting Hamilton off the train, and the jury determined it against the plaintiff in error.

All the testimony show that there was not a bit of disturbance between Rye Patch and Lovelock and there was no threat of any. (Testimony of Hamilton as quoted on pp. 25 and 58 of plaintiff's brief.) No threat was made that any assault would be made. Not only did the jury believe that, but the Court must also have believed that theory of the case, as the motion of plaintiff in error for a non-suit was denied, and again, the Court on motion for a new trial allowed the verdict to stand for fifteen thousand dollars. He saw the witnesses, heard them testify, and believed that the arrest was but a means to obtain an end, to wit: the ejection of Hamilton from the cars of the corporation. It is strange that 13 men, one of them a judge, learned in the law, should say by their action on the question at issue, that the arrest was a means to obtain an end, viz: the enforcement of one of the rules of the corporation.

Counsel for plaintiff in error assumes at p. 14 of their argument, that there were no disputed facts in the question of what capacity its officer acted in. We say there were. He was but the

instrument used by the conductor to accomplish the designs of the corporation, and if that is true, and the Court and jury by their decision say so, then a warrant issued upon a complaint sworn to by one of the agents of the corporation would not have helped it one particle. It cannot put the blame on the poor constable, who, at its instigation and request, ejected Hamilton to enforce one of its rules.

We maintain that the very doctrine of *res adjudicata* relied upon by plaintiff in error is against them, and in support of our position, the magistrate adjudged that Hamilton had committed no crime, and the Circuit judge came to the same conclusion in submitting the question to the trial jury. Both decided that there was no probable cause, so in the case at bar, the Court held it a question of law and fact whether or not its officer acted as an agent of the company, and under the proper instructions, submitted it to the jury and they, by their verdict, decided that he acted as the agent of the company just as much as Anthony did for the company in the case already cited.

We maintain that every word of the testimony given by either side shows that the whole information given to the constable was given by the agents of the company, and that it was given without probable cause and therefore given for the purpose of making an officer its agent to further its designs and eject Hamilton from the train, and especially

the last part of the constable's testimony. All of Whited's and all of Donlen's testimony corroborates that view of the case. "He said he thought "it was necessary to have him arrested." And that is the first time it ever entered into the head of any of them to have him arrested.

See Plaintiff's Brief, p. 33.

Even Patterson, the car inspector of the whole system of the Southern Pacific Company did all he could to forward the scheme of plaintiff in error. Marker (p. 36 transcript) also testified that he saw Derbyshire point out Hamilton to Cozzens, and so does Adolph Son (p. 37 transcript).

And Derbyshire himself nowhere denies that. And Marker was a disinterested witness and a man of property and standing in the community where he resides.

Derbyshire has been mistaken in many things. He was sure Hamilton pointed the pistol at him. Hamilton explains why he got upon the seat: that he did not want to use the pistol; that he could stand off five or six men there without weapons, and that he knew he did not point the pistol at Derbyshire because he was acquainted with a gun and that he never pointed it at any person or thing until he was ready to use it, and then he would bring it down and point it when he was forced to use it.

The complaint filed by Donlen was false, and the warrant issued thereon was issued simply to enforce the rules of the company, as was the prosecution conducted by the attorney of the corporation, and was only good to shield the officer serving it, but not the party putting the machinery of the law in motion.

We deny that a peace officer in a case like the one at bar had any right to arrest without a warrant. The pretended assault was committed 35 or 40 minutes before the train arrived at Lovelock. No commotion or disturbance was or had been for that length of time going on. All the row was over. The train was yet 70 miles from Wadsworth and over 100 from the state line. The county boundary did not limit the jurisdiction of the justice of the peace. Whited could have had him arrested when he arrived at Wadsworth; he could have sworn to a complaint as easily and upon as much information as Donlen did. The agent, Donlen, and the constable all knew what Hamilton was arrested for long before any complaint was sworn to, or warrant issued, and even if they did not it does not help plaintiff in error. Both and all of them acted by request and under the commands of the corporation, and Cozzens was as much the agent of the corporation in making the arrest as Donlen was in swearing out the complaint. If Cozzens was not acting for the company why did he not swear to the complaint himself? If Donlen was not acting for the com-

pany in swearing to the complaint, who was he acting for? Does anyone mean to say that Donlen would have sworn to a complaint against Hamilton if he had been blamed with drawing a pistol against anyone else?

See *Krulevitz* vs. *Eastern R. R.*, 143 Mass., 231, 232.

The question as to the form of action spoken of in brief of plaintiff in error on pp. 40, 41, was strenuously urged before the trial Court, and the answer given them then is entirely sufficient; that all forms of action is abolished by the code; that all a plaintiff has to do is to state the facts constituting his cause of action, and the Court decided then that the complaint was and is sufficient, and no exceptions were taken to the ruling.

Hall vs. *Memphis & C. R. Co.*, 15 Fed. 59.

Plaintiff in error in its brief at p. 43, asserts that Hamilton admitted that he had committed a crime. Our answer to that is that such assertions does not make it so, and that the Court can see for itself that there is no such testimony in the case, and we are sure that this Court will take the same view of the case as did the Court below; that it is a mixed question of law and fact what Hamilton was arrested for.

The instructions of the Court quoted at pp. 44, 45 of the company's brief are, if any fault can be found with them, too favorable to the plaintiff in error, and so were all the instructions. You cannot take a part of an instruction and hold it up as error. You must take the instructions all together and as a whole, not in detached shreds; but even the part set out is without fault. The agent of the corporation did not inform him at the time he went on the train that the ticket in that form was not good, but that if he did not sign it he would have trouble with the conductors. The ticket was ridden upon from Omaha to Denver, unsigned. The U. P. Co. was the agent of the S. P. Co. The ride from Denver to Ogden was made without trouble, and would have been to San Francisco but for the unreasonableness and arbitrariness of the servants of the plaintiff in error.

Hamilton did not invite a wrong. If he had gone off the car when Derbyshire pulled at him, you might say so, but all he wanted was to go on his way. It was not right to ask him to pay again what he had already paid for. The company had his money, why did they not give it back to him if he was the possessor of one of their own tickets which plaintiff in error found fault with? What right or justice was there in that manner of settling a dispute? Plaintiff in error acknowledges the ticket a good first-class unlimited ticket if it was signed.

Their portion of the purchase price $\$33\frac{42}{100}$ (p. 61 of transcript) was in their possession, at least their agent, the U. P. Co., had it, and the possession of the agent was the possession of the principal. Why did it not return it before it asked him to leave the train?

No one can read Hamilton's testimony but will see at once that he did not resist for any other reason but because he desired to proceed upon his journey, and no one would ever have heard of it had it not been for the arrest and prosecution. Had Hamilton been allowed to proceed no one would have been injured or lost a cent by it. He would not have been put off the cars, in irons, in the middle of a desert, at night, held up to the contumely of a multitude of people as a felon, put to the expense of defending his liberty like a thief or murderer only for the iniquitous rule of the company. When he was gotten off the train that did not satisfy the corporation. It must by its agent, Donlen, swear to a complaint, and keep him a prisoner in irons long after all knew what it was for. It must by its able and learned attorneys, living at a distance from Lovelock, prosecute him for an alleged felony never committed. Everything done before and after the arrest was for the enforcement of a rule of the corporation. Besides drawing a pistol on a man is not a felony. It must be drawn upon him not in necessary self-defense, in an angry, threatening manner (p. 57 transcript). Derbyshire telegraphed to Whited that "a man on the

" train had pulled a pistol on me, and asked to have " him taken off at Lovelock." He did not telegraph to any officer of the County, but to his superior officer in the corporation's employ, to whom it was his duty to report (p. 60 of transcript), and at same place, he, Whitehead, says, " that is the way I sign all my official dis- " patches." So he signed an official dispatch to the agent of the corporation at Lovelock, to " have " an officer there when the train arrived," and Donlen did as he was told by his superior officer, and thought it necessary to have him arrested, and by direction of that official dispatch he did have him arrested, and swore to a complaint against him long after he must have known all the facts in the case. But even if he did not Derbyshire did, and he was the agent of the corporation, and so the corporation knew it. There can be no dispute about that.

The constable in this case had no right as a peace officer to arrest Hamilton. He could only arrest—

1st, For a public offense committed or attempted in his presence.

2nd, Where the person arrested has committed a felony, although not in his presence.

3rd, Where a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

4th, On a charge made upon reasonable cause of the commission of a felony by the party arrested.

Upon which of these grounds was Mr. Hamilton arrested? It must have been the 4th. If so, did the officer make a lawful arrest? We say no. We say he had no reasonable cause. So did two judges and one magistrate and one U. S. judge. But outside of that, the Statute of Nevada, as quoted, (p. 75 transcript), says, that "when arrest-"ing a person without a warrant, the officer must "inform him of his authority and the cause of the "arrest, except when he is in the actual com-"mission of a public offense, or when he is pursued "immediately after an escape." Was this done? (Page 60 of transcript.) Hamilton was not in the commission of a public offense, nor was he being pursued after an escape.

Is it not a fact that the arrest and legal proceedings was an after thought and originated in the brain of Donlen? He says, p. 49 transcript: "I suppose it was necessary to arrest him;" and Cozzens says, p. 41: "They (meaning the R. R. Co.) wanted me to take him off. I took "him off." P. 45 Id. "He told me there was a man "on No. 4 that pulled a six-shooter on the con-"ductor at Rye Patch, and they wanted me to take "him off the train." And again repeats the same words in the same page, "and he wanted me to "take him off the train." Again at p. 47 Id., "Well, "I took him off because he had drawn a weapon "or pistol or six-shooter on the conductor, as I "was told." And again in answer to Mr. Wines' question, p. 48. "When you were requested

"to take Mr. Hamilton off that train, was there "anything said to you by anybody that the Com- "pany requested you to take him off because he "had refused to sign a ticket or would not pay his "fare?" "A. No Sir." And Derbyshire says at p. 57: "I then sent a message to Mr. Whited, "at Wadsworth, the Division Superintendent, "that a man on the train had pulled a pistol on "me—a six-shooter, I think I worded it—and "asked to have him taken off; asked him to have "him taken off at Lovelock. I could not remem- "now exactly how it was worded. I wanted him "taken off." And again at same folio, "I stated "to Cozzens, as near as I can recollect, that he "had pulled a gun on me, and I would like to "have him taken off the train." And again at p. 57, "He was taken off there, and the train "went on." And at folio 91, the constable in answer to Mr. Wines says:

"Q. (To Crozzens, p. 48 transcript.) Were "you present when the complaint was filed "against him in the course of a half an hour after?

"A. Yes sir; I believe I was.

"Q. Who drew up the complaint?

"A. I think the justice drew it up.

"Q. Did you hear a conversation at that time "between the justice and anybody else in the "presence of Hamilton? Did you hear a conver- "sation between Mr. Donlen and the justice when "he drew up the affidavit?

"A. Mr. Donlen and the justice were talking "but I don't remember for certain whether Mr. "Hamilton was there or not.

"Q. But you knew the justice drew up the "affidavit?

"A. Yes, sir.

"Q. And it was sworn to by Mr. Donlen?

"A. Yes, sir.

"Q. And the warrant was issued and given to "you?

"A. Yes, sir.

"Q. And you made a formal arrest at that "time?

"A. Yes, sir.

"Q. From that time you held Mr. Hamilton "under that warrant, did you?

"A. Yes, sir."

So it is plain that the warrant and the complaint and the imprisonment was all an afterthought; that all that was wanted at first was to get him off the train. Derbyshire, Cozzens, Donlen, Whited, all so understood it. Even counsel spoke of taking him off. And he was taken off—while sitting quietly, and as Derbyshire himself says, "He did not interfere with me when I did not with him in any way. He was perfectly quiet when I let him alone."—p. 58 transcript.

In the same page the same witness says: "I was "not molesting him when he pointed his pistol at

"me." But Derbyshire was mistaken in that. Both Mr. Adolph Son and Mr. Levy, of San Francisco, confirm Hamilton's statement about that.—p. 40 transcript.

There was no disturbance at any time, except what was made by the servants of the corporation in their efforts to eject Mr. Hamilton.

The purchaser of a railway ticket does not, by its mere acceptance, acquiesce in and bind himself to all the terms and conditions printed thereon, in the absence of actual knowledge of them, although he bought the ticket at a reduced rate from regular fare, but at a rate usual with a class of passengers to which he belonged.

Kent vs. *B. & O. R. Co.*, 4 Am. St. Rep., 540, and authorities on page 541.
Note 8 (b), pp. 81, 82, 15 Fed. Rep.
R. vs. *Pa. R.*, 48 N. Y., 212.
Blossom vs. *Dodd*, 43 N. Y., 265.

First-class tickets are assignable by delivery, so as to pass to another holder the right of the original purchaser, as against the company issuing it, or against the company on whose authority it may have been issued by another company. Nor does it make any difference from whom he bought the ticket.

Carlston vs. *N. P. R. R. Co.*, 47 N. W., 49.
Hoffman vs. *N. P. R. R. Co.*, 47 N.W., 312.

Sleeper vs. *R. R. Co.*, 45 Am. Rep. 38.
Note 9, p. 82, 15 Fed. Rep., and citations on pp. 82, 83.
Hudson vs. *Pac. Ry.*, 9 Fed., 879.

The possession of a ticket is *prima facia* evidence that the holder has paid the regular price for it, and of his right to be transferred at some time between the places specified thereon, on some passenger train.

Thompson on Carrier of Passenger, 65-376; 24 Barb. 514.
Davis vs. *R. Co.*, 20 U. C. Q. B., 27.

"The contract between the R. R. Co. and the "purchaser of a ticket is made when ticket is "bought and paid for, * * * * neither party can, "after that, change its terms or impose new con- "ditions upon its enforcement without the consent "of the other."

Kent vs. *B. & O. R. Co.*, *supra*, and citations.

The U. P. Co. was the agent of the S. P. Co., and the latter was bound by the acts of the former. The ticket says upon its face that this is so. See

ticket. And Meecham says, sec. 6, "A General "Agent is an agent who is empowered to trans- "act all of the business of his principal of a par- "ticular kind or in a particular place. A Special "Agent is one authorized to act only in a specific "transaction."

When an agency is shown to exist, the presumption would be that the agent's authority was general rather than limited.

Meecham on Agency, sec. 9, and citations.

"And persons dealing with an agent have a "right to presume that his agency is general and "not limited, and notice of the limited authority "must be brought to their knowledge before they "are to regard it."

Trainor vs. *Morrison*, 57 Am. Rep. 791, 78 Me. 160.

"Notice to the agent or the knowledge of agent "is the knowledge of the principal.

Meecham on Agency, sec. 718.

"The principal is bound by agents representa- "tions of extrinsic facts upon which authority "depends.

Sec. 717, Meecham on Agency.

"In accordance with this rule, it was then held "that a carrier which had authorized an agent to "issue bills of lading in its name, upon receipt of the "property for transportation, is liable upon a "bill of lading issued by such agent and transferred "to the shipper, to one who, on the faith of it, had "discounted a draft on the consignee, although in "fact no property had been received by the carrier."

Bank of Batavia vs. *N. Y. L. E. & W. R. Co.*, 106; N. Y., 195, 60; Am. Rep., 440, 12; N. E. 433, see note 2; M. on Agency, 717.

DUTY OF RAILROAD COMPANY TO HONOR TICKET.

"When a railroad ticket has been purchased in "good faith from an agent acting within the general "scope of his employment, it is the duty of the sev- "eral companies named therein to honor it until it "is used, or expires by its own limitation."

Young vs. *Pa. R. Co.*, 7 Atlantic, 741; 115 Pa. St., 113.
Thompson on Car. of Passengers, p. 433, sec. 2.
Id., p. 434, sec. 3.
Coal Run Coal Co. vs. *Jones*, (Ill.) 20 M. E. 89.

The last point in appellant's brief is that the damages were excessive. Our answer to that is that no decent, respectable man, who is a stranger in Utah and Nevada, which are nothing but a desert waste along the line of the company's road, from Ogden until you reach Reno, would go through the annoyance, indignities, ill usage, abuse, arrest and imprisonment which he suffered. Is it a slight matter to be told, after riding over 700 miles on a ticket, that it is not good and that you have no right to ride on it, that you are stealing a ride, in the presence of fellow passengers, ladies and gentlemen, with whom you have traveled for almost two days; that you are a trespasser and an impostor. To be afterward taken hold of in such a manner by two servants of a corporation and pulled and hauled on as if you were a common tramp, and then arrested like a felon, upon a trumped-up charge of felony; ironed like a thief or murderer, marched off the train at the point of a gun, after dark, in a strange place in a bitter cold night, before all the people of the village; caused to stand in a store where all are assembled to get their mail, while people stare at him until the justice of the peace comes for his mail, when he is taken to jail. A warrant is sworn out, bonds fixed, and paroled by a humane bystander; prosecuted by the company's attorneys, and finally, after much trouble, anxiety and expense, he is by the magistrate discharged. I wonder what any one of the gentlemen connected

with the case would take to have such indignities heaped upon him. But over and above and outside of all that, this court cannot meddle with the verdict upon the ground that it is excessive.

The Justice vs. *Murray*, 9 Wall., 277.
Parsons vs. *Bedford*, 3 Pet., 433.
Authorities cited, p. 24 g. Desby's Federal Procedure.

The Seventh Amendment Constitution of U. S. says:

"Trial by Jury. In suits at common law, "where the value in controversy shall exceed "$20, the right of trial by jury shall be preserved, "and no fact tried by a jury shall be otherwise "re-examined in any Court of the United States, "than according to the rules of common law."

And the U. S. Supreme Court says in *Aetna Life Insurance Co.* vs. *Ward*, 140 U S. at p. 91:

"Upon the whole case, we do not think that "the defendant was in any manner prejudiced by "any rulings of the Court on the trial of the case. "It may be, if we were to usurp the functions of "the jury and determine the weight to be given "to the evidence, we might arrive at a different "conclusion, but this is not our province on a "writ of error. In such a case we are confined "to the consideration of exceptions, taken at the

"trial, to the admission or rejection of evidence, "and to the charge of the Court and its refusal to "charge. We have no concern with questions of "fact, or the weight to be given to the evidence "which was properly admitted." See authorities there cited.

In *Erie R. R. Co.* vs. *Winter*, p. 75, 143, U. S., the Court says:

"Whether the verdict was excessive, is not our "province to determine in this writ of error. The "correction of that error, if there were any, lay "with the Court below upon a motion for a new "trial, the granting or refusal of which is not "assignable for error here. As stated by us in "*Aetna Life Ins. Co.* vs. *Ward*." Repeating what is quoted above.

And see this case as to the right of resistance, 143, U. S., 73.

The same reasoning and the same law governs as to excessive force. Hamilton told the officers not to iron him, that he would not resist, p. 25: "I said, 'Gentlemen, I am not going to make any "resistance.'" "I said, 'There is no need of these "handcuffs.'" "I said, 'I was not going to "struggle.'" He showed them where to find his gun. He protested all the time. It was here that the jury found that there was more force

used than necessary, and this Court cannot interfere with that question unless it finds there was no evidence at all to support it.

In conclusion we say that the able judge who tried the case said when reducing the verdict that he did not think the jury acted with prejudice. He knew all of them personally. He saw every witness upon the stand. He complimented all parties connected with the case (Dentson, the Omaha man, excepted), and stated that it was an open, honest, manly and able contention for the points relied upon to sustain their respective rights in this case. Not a word against the corporation, not a hard name, or a fault found with the company, its agents, servants or attorneys. Everything investigated with patience, forbearance and skill as far as the judge, jury and counsel for the plaintiff in error. If ever there was a case tried in a court of justice upon the cold facts, in our humble judgment this one was, and we believe the standing of the judge who tried it, and his judgment of those engaged in it, is a guaranty of that fact. It must be remembered in connection with the size of the verdict that we argued before the judge and jury, and it is the law, that the wealth of a defendant is a proper subject to be considered, and that a thousand dollars verdict to a common man would be a greater punishment to him than one hundred thousand would be to a corporation like the plaintiff in error, worth millions of dollars;

that the only way a corporation can be punished is by mulcting it in damages.

We respectfully submit that a close scrutiny of all the law and facts in the case will convince this Court of the justice of our cause, and of the case being entirely free from errors.

Respectfully submitted,

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